TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1909

No. 120.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

THE UNION SUPPLY COMPANY.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

FILED APRIL 10, 1909.

(21101.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1908.

No. 338.

THE UNITED STATES, PLAINTIFF IN ERROR,

vs.

THE UNION SUPPLY COMPANY.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

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1 UNITED STATES OF AMERICA, DISTRICT OF NEW JERSEY, *ss:*

I, George T. Cranmer, clerk of the District Court of the United States for the District of New Jersey, do hereby certify that the annexed are true copies of, in United States of America, Plaintiff in Error, vs. The Union Supply Company, Defendant in Error, indictment for failure to make returns as wholesale dealers in oleomargarine, notice to appear and plead to indictment, order quashing indictment, petition for writ of error, order allowing writ of error, assignment of errors, together with original writ of error, returnable April 17, 1908, and original citation, returnable April 17, 1908, as the same remain of record, and on file in my office.

In testimony whereof, I have hereto subscribed my name and affixed the seal of said court, at Trenton, in said district, this twentieth day of March, A. D. nineteen hundred and eight.

[SEAL.] GEORGE T. CRANMER,
Clerk.

2 UNITED STATES OF AMERICA, DISTRICT OF NEW JERSEY, *ss:*

In the District Court of the United States, in and for the district aforesaid, at the April term thereof in the year one thousand nine hundred and seven.

The grand jurors of the United States, impaneled, sworn and charged at the term aforesaid of the court aforesaid, on their oath present, that The Union Supply Company, a body corporate of the State of New Jersey, on the first day of November, one thousand nine hundred and six, and upon divers other days and times as well before as afterwards, and more particularly during the month of November, in the year aforesaid, at Camden, in the county of Camden, in said district, and within the jurisdiction of this court, was a wholesale dealer in oleomargarine, and thereupon it became the duty of the said The Union Supply Company to keep such books and render such returns in relation thereto as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, had before that time, and then and there by regulation required; that the said Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury had, upon the said first day of November, one thousand nine hundred and six, and at divers other times prior thereto, required, by regulation, all wholesale dealers in oleomargarine to keep certain books and render certain returns in relation thereto, which said requirements, so established by regulations, were in force on the first day of December, one thousand nine hundred and six, and the said The Union Supply Company then and there had notice of the same; that said regulations are of too great length to be set forth herein in full, but profert thereof is here made, and which, so far as they are material to the present charge, are as follows:

3 "Every wholesale dealer in oleomargarine is required to enter, on the day when received, in a book (Form 61) or on Form 217, properly bound, the number of packages and pounds of

oleomargarine received, the number of packages and pounds of oleomargarine disposed of, and the name and place of business or residence of each person to whom sold or consigned. (Model blank form furnished by Commissioner of Internal Revenue.)"

"Wholesale dealers in oleomargarine will make monthly returns on Form 217 (with inside sheets when needed to complete the detailed statements), showing in detail the number of packages and number of pounds of oleomargarine received direct from manufacturers and other wholesale dealers, also the quantity disposed of, with the name and address of each person to whom sold or consigned. These returns will be rendered on the first day of the month succeeding that for which the return is made, or within ten days thereafter, in duplicate, to the collector, who will forward one copy to the Commissioner of Internal Revenue."

And the grand jurors aforesaid, on their oath aforesaid, do further present that the said The Union Supply Company, at Camden, aforesaid, did on, to wit, the first day of December, one thousand nine hundred and six, make a certain return on Form 217, so required as aforesaid, showing thereby that it, the said The Union Supply Company, had then and there, and during the month of November, aforesaid, received a large quantity of oleomargarine, to wit, seven thousand six hundred and twenty-eight pounds thereof, which had been disposed of as follows, that is to say: Two thousand two hundred pounds thereof sold to William H. Reeves, City Market, Wilmington, Delaware, nine hundred and sixty pounds on the nineteenth day of November, one thousand nine hundred and six, and one thousad two hundred and forty pounds on the twenty-seventh day of November, one thousand nine hundred and six; and one thousand two hundred and forty pounds thereof sold to Holt & Company, 42 King street, Wilmington, Delaware, on the twenty-seventh day of November, one thousand nine hundred and six; one thousand one hundred and sixteen pounds thereof sold to W. S. Kern, City Market, Wil-
4 mington, Delaware, on the twenty-sixth day of November, one thousand nine hundred and six; one thousand three hundred and sixty-four pounds thereof sold to The Diamond State Dairy Company, of Wilmington, Delaware, on the twenty-seventh day of November, one thousand nine hundred and six; and one thousand seven hundred and eight pounds thereof to George A. Jones, of 837 King street, Wilmington, Delaware, eight hundred and forty pounds on the twenty-first day of November, one thousand nine hundred and six, and eight hundred and sixty-eight pounds on the thirtieth day of November, one thousand nine hundred and six; which said return was false and untrue in that it, the said The Union Supply Company, did not, by sale or otherwise, dispose of the said two thousand two hundred pounds of oleomargarine, or any part thereof, to the said William H. Reeves, of City Market, Wilmington, Delaware, nor the said one thousand two hundred and forty pounds of oleomargarine or any part thereof to the said Holt & Company, of 42 King street, Wil-

mington, Delaware, nor the said one thousand one hundred and sixteen pounds of oleomargarine or any part thereof to the said W. S. Kern, City Market, Wilmington, Delaware, nor the said one thousand three hundred and sixty-four pounds of oleomargarine or any part thereof to the said The Diamond State Dairy Company, of Wilmington, Delaware, nor the said one thousand seven hundred and eight pounds of oleomargarine or any part thereof to the said George A. Jones, of 837 King street, Wilmington, Delaware.

And so the grand jurors aforesaid, upon their oath aforesaid, do say that The Union Supply Company, on the first day of December, one thousand nine hundred and six, at Camden, aforesaid, in the district aforesaid and within the jurisdiction of this court, in manner and form aforesaid, did knowingly, wilfully, and unlawfully
5 fail to render such return in relation to its business of wholesale dealer in oleomargarine as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, did, by regulation, then and there require, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

JOHN B. VREELAND,
United States Attorney, District of New Jersey.

6 (Indorsed:) No. 11. April term, 1907. United States District Court, District of New Jersey. The United States of America versus The Union Supply Company. Indictment for failure to make returns as wholesale dealers in oleomargarine. Act of August 2, 1886, as amended October 1, 1890, and May 9, 1902. 3 Fed. Stats. Ann., 13136. A true bill. J. Henry Bachellor, foreman. John B. Vreeland, U. S. Attorney. Filed Apr. 23, 1907, at 12 o'clock m. George T. Cranmer, clerk.

7 United States District Court, District of New Jersey.

THE UNITED STATES OF AMERICA *vs.* THE UNION SUPPLY COMPANY.	On indictment found at the April term, 1907.

Please take notice that an indictment was found in the above-entitled court, at the April term thereof, by the grand jurors thereof against The Union Supply Company, for failing to render such return in relation to its business of wholesale dealer in oleomargarine as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, did, by regulation, then and there require (a copy whereof is hereunto annexed); and that the said The Union Supply Company is hereby commanded and notified to appear at the said court on Monday, the thirteenth day of May, one thousand nine hundred and seven, at the hour of half past ten o'clock in the forenoon, at the post-office building in the city of Trenton and State of New Jersey, to answer to such indictment, and that the trial of said

indictment will be moved May fourteenth, instant, at ten thirty o'clock a. m.

Dated May first, nineteen hundred and seven.

Yours, &c.,

JOHN B. VREELAND,
United States Attorney.

TO THE UNION SUPPLY COMPANY, OR WHOM IT MAY CONCERN.

8 UNITED STATES OF AMERICA, DISTRICT OF NEW JERSEY, *ss:*

In the District Court of the United States in and for the district aforesaid, at the April term thereof in the year one thousand nine hundred and seven.

The grand jurors of the United States, impaneled, sworn, and charged at the term aforesaid of the court aforesaid, on their oath present that The Union Supply Company, a body corporate of the State of New Jersey, on the first day of November, one thousand nine hundred and six, and upon divers other days and times, as well before as afterwards, and more particularly during the month of November, in the year aforesaid, at Camden, in the county of Camden, in said district, and within the jurisdiction of this court, was a wholesale dealer in oleomargarine, and thereupon it became the duty of the said The Union Supply Company to keep such books and render such returns in relation thereto as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, had before that time, and then and there, by regulation required; that the said Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, had, upon the said first day of November, one thousand nine hundred and six, and at divers other times prior thereto, required, by regulation, all wholesale dealers in oleomargarine to keep certain books and render certain returns in relation thereto, which said requirements, so established by regulations, were in force on the first day of December, one thousand nine hundred and six, and the said The Union Supply Company then and there had notice of the same; that said regulations are of too great length to be set forth herein in full, but profert thereof is here made, and which, so far as they are material to the present charge, are as follows:

9 "Every wholesale dealer in oleomargarine is required to enter, on the day when received, in a book (Form 61) or on Form 217, properly bound, the number of packages and pounds of oleomargarine received, the number of packages and pounds of oleomargarine disposed of, and the name and place of business or residence of each person to whom sold or consigned. (Model blank form furnished by Commissioner of Internal Revenue.)"

"Wholesale dealers in oleomargarine will make monthly returns on Form 217 (with inside sheets when needed to complete the detailed statements), showing in detail the number of packages and number of pounds of oleomargarine received direct from manufacturers and other wholesale dealers, also the quantity disposed of, with the name and address of each person to whom sold or consigned. These returns

will be rendered on the first day of the month succeeding that for which the return is made, or within ten days thereafter, in duplicate, to the collector, who will forward one copy to the Commissioner of Internal Revenue."

And the grand jurors aforesaid, on their oath aforesaid, do further present that the said The Union Supply Company, at Camden, aforesaid, did on, to wit, the first day of December, one thousand nine hundred and six, make a certain return on Form 217, so required as aforesaid, showing thereby that it, the said The Union Supply Company, had then and there, and during the month of November, aforesaid, received a large quantity of oleomargarine, to wit, seven thousand six hundred and twenty-eight pounds thereof, which had been disposed of as follows, that is to say: Two thousand two hundred pounds thereof sold to William H. Reeves, City Market, Wilmington, Delaware, nine hundred and sixty pounds on the nineteenth day of November, one thousand nine hundred and six, and one thousand two hundred and forty pounds on the twenty-seventh day of November, one thousand nine hundred and six; and one thousand two hundred and forty pounds thereof sold to Holt & Company, 42 King street, Wilmington, Delaware, on the twenty-seventh day of November, one thousand nine hundred and six; one thousand one hundred and sixteen pounds thereof sold to W. S. Kern, City Market, Wilmington, Delaware, on the twenty-sixth day of November, one thousand nine hundred and six; one thousand three hundred and sixty-four pounds thereof sold to The Diamond State Dairy Company, of Wilmington, Delaware, on the twenty-seventh day of November, one thousand nine hundred and six; and one thousand seven hundred and eight pounds thereof to George A. Jones, of 837 King street, Wilmington, Delaware, eight hundred and forty pounds on the twenty-first day of November, one thousand nine hundred and six, and eight hundred and sixty-eight pounds on the thirtieth day of November, one thousand nine hundred and six; which said return was false and untrue in that it, the said The Union Supply Company, did not, by sale or otherwise, dispose of the said two thousand two hundred pounds of oleomargarine, or any part thereof, to the said William H. Reeves, of City Market, Wilmington, Delaware, nor the said one thousand two hundred and forty pounds of oleomargarine or any part thereof to the said Holt & Company, of 42 King street, Wilmington, Delaware, nor the said one thousand one hundred and sixteen pounds of oleomargarine or any part thereof to the said W. S. Kern, City Market, Wilmington, Delaware, nor the said one thousand three hundred and sixty-four pounds of oleomargarine or any part thereof to the said The Diamond State Dairy Company, of Wilmington, Delaware, nor the said one thousand seven hundred and eight pounds of oleomargarine or any part thereof to the said George A. Jones, of 837 King street, Wilmington, Delaware.

And so the grand jurors aforesaid, upon their oath aforesaid, do say that The Union Supply Company, on the first day of December,

one thousand nine hundred and six, at Camden, aforesaid, in the district aforesaid and within the jurisdiction of this court, in manner and form aforesaid, did knowingly, wilfully, and unlawfully
11 fail to render such return in relation to its business of wholesale dealer in oleomargarine as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, did, by regulation, then and there require, contrary to the form of the statute in such case made and provided, and against the peace and dignity of the United States.

JOHN B. VREELAND,
United States Attorney, District of New Jersey.

12 (Indorsed:) United States District Court, District of New Jersey. The United States of America versus The Union Supply Company. On indictment found at April term, 1907. Notice to appear and plead to indictment. John B. Vreeland, United States attorney, 738 Broad street, Newark, N. J. Service of the within notice is hereby acknowledged this day of May, 1907. Attorneys of defendant. Filed May 13, 1907, at 11 o'clock a. m. George T. Cranmer, Clerk.

Duly served May 6th, A. D. 1907, on Walter E. Douglass, one of the incorporators of The Union Supply Company, personally. Joseph G. Smith, Deputy U. S. Marshal.

13 United States District Court, District of New Jersey.

THE UNITED STATES OF AMERICA,
vs.
THE UNION SUPPLY COMPANY.

Sur indictment failure to make returns as wholesale dealers in oleomargarine act of August 2, 1886, as amended October 1, 1890, and May 9, 1902. Order quashing indictment.

The defendant, a New Jersey corporation, having appeared by attorney and now moving to quash the indictment found against it, and counsel for the defendant and for the United States of America having been heard on said motion,

It is on this eighteenth day of February, nineteen hundred and eight, ordered, that the indictment lately found against the said defendant be and the same is hereby quashed on the ground that the sixth section of the act of Congress, approved May ninth, nineteen hundred and two, entitled, "An act to make oleomargarine and other imitation dairy products subject to the laws of any State, or Territory or the District of Columbia into which they are transported, and to change the tax on oleomargarine, and to impose a tax, provide for the inspection, and regulate the manufacture and sale of certain dairy products, and to amend an act entitled 'An act defining butter, also imposing a tax upon and regulating the manufacture, sale,

importation, and exportation of oleomargarine,' approved August second, eighteen hundred and eighty-six," being chapter seven hundred and eighty-four of volume thirty-three of Statutes at Large, on page one hundred and ninety-three, is not applicable to a corporation.

Let this order be entered in the minutes.

W. M. LANNING,
Judge.

14 (Indorsed:) United States District Court, District of New Jersey. The United States of America versus The Union Supply Company. Sur indictment failure to make returns as wholesale dealers in oleomargarine. Order quashing indictment. Filed Feb. 18, 1908, at 11 o'clock a. m. orge T. Cranmer, Clerk.

15 United States District Court, District of New Jersey.

THE UNITED STATES OF AMERICA, plaintiff in error.
vs.
THE UNION SUPPLY COMPANY, defendant in error.
} Petition for writ of error.

And now comes The United States of America by John B. Vreeland, United States district attorney for the District of New Jersey, its attorney herein, and says:

That on or about the eighteenth day of February, nineteen hundred and eight, the United States district court for the District of New Jersey entered a judgment herein in favor of the defendant, The Union Supply Company, and against this plaintiff, The United States of America, in which judgment and the proceedings had prior thereto in this cause certain errors were committed to the prejudice of this plaintiff, all of which will in more detail appear from the assignment of errors which is filed with this petition.

Wherefore this plaintiff prays that a writ of error may issue in this behalf out of the Supreme Court of the United States for the correction of errors so complained of, and that a transcript of the record, proceedings, and papers in this cause duly authenticated, may be sent to the Supreme Court of the United States.

JOHN B. VREELAND,
United States District Attorney, Attorney for Plaintiff in Error.

15 (Indorsed:) United States District Court. District of New Jersey. The United States of America, plaintiff in error, versus The Union Supply Company, defendant in error. Petition for writ of error. John B. Vreeland, United States attorney, atty. for pltff. in error. Filed Mar. 16, 1908, at 11 o'clock a. m. George T. Cranmer, Clerk.

16 United States District Court, for the District of New Jersey.

THE UNION SUPPLY COMPANY, plaintiff in error. *vs.* THE UNITED STATES OF AMERICA, defendant in error.	Sur indictment failure to make returns as wholesale dealers in oleomargarine. Order allowing writ of error.

This sixteenth day of March, nineteen hundred and eight, comes the United States of America, by John B. Vreeland, United States district attorney, its attorney, and files herein and presents to the court, its petition praying for the allowance of a writ of error and an assignment of errors intended to be urged by it, praying also that a transcript of the record and proceedings and papers upon which the judgment herein was rendered, duly authenticated, may be sent to the Supreme Court of the United States, and that such other and further proceedings may be had as are proper in the premises.

On consideration whereof, the court does allow the writ of error to the said The United States of America.

W. M. LANNING, *Judge.*

17 (Indorsed:) United States District Court. District of New Jersey. The United States of America, plaintiff in error, versus The Union Supply Company, defendant in error. Sur indictment failure to make returns as wholesale dealers in oleomargarine. Order allowing writ of error. John B. Vreeland, United States Attorney, Atty. of Pltff. in Error. Filed Mar. 16, 1908, at 11 o'clock a. m. George T. Cranmer, Clerk.

18 United States District Court, District of New Jersey.

THE UNITED STATES OF AMERICA, PLAINTIFF in error. *vs.* THE UNION SUPPLY COMPANY, DEFENDANT in error.	On writ of error. Assignment of errors.

And now comes the said The United States of America, by John B. Vreeland, United States district attorney for the District of New Jersey, attorney of the plaintiff in error, and says that in the record, proceedings and judgment entered in this cause there is manifest error, and the said plaintiff in error hereby assigns and sets out, separately and particularly, the following errors upon which it will rely on its writ of error from the judgment of this honorable court entered on the eighteenth day of February, 1908, in the above-entitled cause.

I.

The said court erred in quashing the indictment.

II.

The said court erred in holding that the sixth section of the act of Congress, approved May ninth, nineteen hundred and two, entitled, "An act to make oleomargarine and other imitation dairy products subject to the laws of any State, or Territory, or the District of Columbia, into which they are transported, and to change the tax on oleomargarine and to impose a tax, provide for the inspection, and regulate the manufacture and sale of certain dairy products, and to amend an act entitled 'An act defining butter,
19 also imposing a tax upon and regulating the manufacture, sale, importation, and exportation of oleomargarine,' approved August second, eighteen hundred and eighty-six," being chapter seven hundred and eighty-four of volume thirty-three of Statutes at Large, on page one hundred and ninety-three, is not applicable to a corporation.

III.

The said court erred in quashing the indictment found against the defendant as a wholesale dealer in oleomargarine, for violation of section six of the above quoted act, on the ground that a corporation, not being amenable to punishment as provided by said section, could not be lawfully convicted of a violation thereof.

IV.

The said court erred in so construing the statute above quoted as to relieve the defendant for liability thereunder on the sole ground that defendant was and is a corporation.

V.

The said court erred in so construing the sixth section of the act of Congress of May ninth, nineteen hundred and two, above quoted as to relieve an offender against said statute from all punishment thereunder on the sole ground that the defendant, being a corporation, could not be imprisoned.

VI.

That the said court erred in holding that the matters charged in the indictment against the said defendant do not constitute a crime.

VII.

That the said court erred in adjudging and deciding that section six of the act of May ninth, nineteen hundred and two, above quoted, does not apply to a corporation.

Wherefore, the above-named plaintiff in error prays that
20 the said judgment of said court quashing said indictment may be reversed.

JOHN B. VREELAND,
United States District Attorney, Attorney for Plaintiff in Error.

21 (Indorsed:) United States District Court. District of New Jersey. The United States of America, Plaintiff in Error, versus The Union Supply Company, Defendant in Error. On writ of Error. Assignment of Errors. John B. Vreeland, United States Attorney, Atty. for Pltff. in Error. Filed Mar. 16, 1908, at 11 o'clock a. m. George T. Cranmer, Clerk.

22 THE UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the judges of the District Court of the United States, for the District of New Jersey, greeting:

Because in the records and proceedings, and also in the rendition of the judgment of a plea which is in the said district court, before you, between The United States of America, and The Union Supply Company, a manifest error has happened, to the great damage of the said The United States of America, as by its complaint appears. We being willing that the error, if any has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you may have the same at the city of Washington on the seventeenth day of April next in the said Supreme Court, to be then and there held, that the record and proceedings aforesaid, being inspected, the said Supreme Court may cause further to be done to correct that error, what of right, and according to the laws and customs of the United States, should be done.

Witness, The honorable Melville W. Fuller, Chief-Justice of the United States, the nineteenth day of March, in the year of our Lord one thousand nine hundred and eight and of the Independence of the United States of America the one hundred and thirty-second.

[SEAL.] H. D. OLIPHANT,
Clerk U. S. Circuit Court, District of New Jersey.

23 (Indorsed:) United States District Court, District of New Jersey. The United States of America, Plaintiff in Error, versus The Union Supply Company, Defendant in Error. Writ of error. Returnable April 17, 1908. John B. Vreeland, United States attorney, atty. for pltff. in error. Filed at o'clock m. Clerk.

24 THE UNITED STATES OF AMERICA, *ss:*

To the Union Supply Company, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at the city of Washington, on the seventeenth day of April next, pursuant to a writ of error

filed in the clerk's office of the District Court of the United States for the District of New Jersey, wherein The United States of America is plaintiff, and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected, and speedy justice be done to the parties in that behalf.

Given under my hand at the city of Trenton, in the District of New Jersey, this nineteenth day of March, in the year of our Lord one thousand nine hundred and eight.

W. M. LANNING,
Judge of the District Court of the United States for the District of New Jersey.

25 (Indorsed:) United States District Court, District of New Jersey. The United States of America, Plaintiff in Error, versus The Union Supply Company, Defendant in Error. Citation, retble April 17, 1908. John B. Vreeland, United States attorney, atty. for pltff. in error. Service is hereby acknowledged March 19, 1908. Charles E. Hendrickson, jr., atty for Union Supply Co. Filed at o'clock m. Clerk.

26 (Indorsed:) United States District Court, District of New Jersey. United States, Plff in Error, versus Union Supply Co., Deft in Error. Transcript. Filed at o'clock m. Clerk.

(Indorsement on cover:) File No. 21101. New Jersey D. C. U. S. Term No. 338. The United States, Plaintiff in Error, vs. The Union Supply Company. Filed April 10th, 1908. File No. 21101.

O

In the Supreme Court of the United States.

OCTOBER TERM, 1908.

THE UNITED STATES, PLAINTIFF IN ERROR, v. THE UNION SUPPLY COMPANY.	No. 338.
THE UNITED STATES, PLAINTIFF IN ERROR, v. BOB CELESTINE.	No. 504.
THE UNITED STATES, PLAINTIFF IN ERROR, v. JOHN A. CORBETT ET AL.	No. 505.
THE UNITED STATES, PLAINTIFF IN ERROR, v. SIMON J. MESCALL.	No. 598.
THE UNITED STATES, PLAINTIFF IN ERROR, v. TILDEN B. STEVENSON ET AL.	No. 615.
THE UNITED STATES, PLAINTIFF IN ERROR, v. TILDEN B. STEVENSON ET AL.	No. 616.
THE UNITED STATES, PLAINTIFF IN ERROR, v. HARVEY SUTTON AND ROBERT MILLER.	No. 649.

MOTION TO ADVANCE.

All of the following cases are before this court on writs of error, sued out by the Government under the criminal appeals act of March 2, 1907 (34 Stat., 1246).

70578—09

No. 338.

THE UNITED STATES *v.* THE UNION SUPPLY COMPANY.

This case arose under the oleomargarine act of August 2, 1886 (24 Stat., 209), as amended by the acts of October 1, 1890 (26 Stat., 567, 621), and May 9, 1902 (32 Stat., 193).

Defendant in error, a wholesale dealer in oleomargarine, was indicted on April 23, 1907, in the District Court of the United States for the District of New Jersey for failure to make such returns in relation to its business as are required by the regulations promulgated by the Treasury Department, such regulations having been prescribed in pursuance of the authority given by the acts above mentioned.

The question involved is whether section 6 of the act of May 9, 1902, applies to a corporation. A motion to quash the indictment on the ground that it did not so apply was sustained.

No. 504.

THE UNITED STATES *v.* BOB CELESTINE.

Defendant in error, an Indian, was indicted in the Circuit Court of the United States for the Western District of Washington for the murder of one Mary Chealco, an Indian woman, within the boundaries of the Tulalip Indian Reservation.

Special pleas to the jurisdiction were filed alleging that, in accordance with certain statutory and treaty provisions, an allotment of land had been made to defendant in error, that a patent had issued therefor,

and that he was therefore subject to the laws of the State of Washington; and, further, that the Mary Chealco named in the indictment was the widow of one Peter Chealco, who, too, before his death, was an allottee of land within the limits of the Tulalip Reservation, and that at his death the widow became entitled to the possession and ownership thereof.

Demurrers to the pleas were overruled and the special pleas sustained.

No. 505.

THE UNITED STATES *v.* JOHN A. CORBETT ET AL.

Defendants in error were indicted in the District Court of the United States for the Western District of Wisconsin under section 5209 of the Revised Statutes for making false entries in a report to the Comptroller of the Currency as to the condition of the First National Bank of Ladysmith, Wis.

The indictment charged, among other things, the making of false entries by the cashier with intent thereby to injure and defraud the banking association, "and to deceive an agent appointed to examine the affairs of such association, to wit, the Comptroller of the Currency of the United States," the president and vice-president, respectively, aiding and abetting therein.

Motion to quash and demurrer on the ground that no offense against the United States was charged were sustained, the court holding that the Comptroller of the Currency is not an "agent appointed

to examine the affairs" of a banking association within the meaning of section 5209, Revised Statutes.

No. 598.

THE UNITED STATES *v.* SIMON J. MESCALL.

This case involves the construction of section 9 of the customs administrative act of June 10, 1890 (26 Stat., 131, 135). Mescall was indicted in the Circuit Court of the United States for the Eastern District of New York, under this section which forbids "any owner, importer, consignee, agent, or other person" from making, or attempting to make, any entry of imported merchandise by means of any fraudulent or false invoice, false statement, or false paper, etc. The indictment, in substance, charged defendant in error, an assistant weigher in the customs service, port of New York, with having made an entry of certain imported cheese by means of a false return of the weights to the collector of customs. Mescall demurred to the indictment on the ground, among others, that section 9 does not apply to any person except an owner, importer, consignee, or agent, and that he was merely rendering assistance to the importer, who was the person making the the entry. The demurrer was sustained.

Nos. 615 and 616.

THE UNITED STATES *v.* TILDEN B. STEVENSON ET AL.

No. 615.—An indictment, consisting of two counts, was returned against the defendants in error in the District Court of the United States for the District

of Massachusetts for violations of sections 4 and 8 of the immigration act of February 20, 1907 (34 Stat., 898). The first count charged that the defendants in error "on July 12, 1907, at Manchaug, * * * Massachusetts," did knowingly, etc., "*bring* into the United States certain alien contract laborers not lawfully entitled to enter the country," in violation of section 8 of the act. The second count charged defendants in error with knowingly, etc., *assisting* certain laborers *to migrate* from Canada to the United States, in violation of section 4 of the act.

Demurrers filed to both counts of the indictment were sustained, the court holding the first count bad for repugnancy; and as to the second count, that while *assisting to migrate* was a misdemeanor by section 4 of the act, no liability was incurred other than that of a penalty imposed by section 5 of the same act, recoverable by a civil action.

No. 616.—This case differs from No. 615 in that the defendants in error were indicted under section 5440 of the Revised Statutes for *conspiring* to bring into the United States alien contract laborers not lawfully entitled to enter, the former meeting and accompanying the laborers from Canada into the United States, in violation of section 8 of the immigration act of February 20, 1907. They were also indicted (indictment consisting of two counts) for conspiring to assist to migrate such laborers into the United States, in violation of section 4 of the immigration act.

Both counts of the indictment were demurred to on various grounds, among them, as to the first count, that no overt act had been alleged to effect the object of the conspiracy. The court overruled this demurrer, sustaining, however, the demurrer to the second count, for the reason given in sustaining the demurrer to the second count of the indictment in case No. 615.

No. 649.

THE UNITED STATES *v.* HARVEY SUTTON AND ROBERT MILLER.

An indictment was returned against the defendants in error in the Eastern District of Wisconsin under section 2139 of the Revised Statutes as amended by the act of January 30, 1897 (29 Stat., 506), charging them with unlawfully introducing and taking spirits and intoxicating liquors into and upon a certain Indian allotment in the Yakima Indian Reservation, such allotment having previously been made, it was alleged, under the provision of the act of February 8, 1887 (24 Stat., 388), entitled "An act to provide for the allotment of lands in severalty to Indians on the various reservations, and to extend the protection of the laws of the United States and the Territories over the Indians, and for other purposes."

A demurrer, interposed on the ground that the acts charged do not constitute a crime, was sustained.

In accordance with the provisions of the act of March 2, 1907 (34 Stat., 1246), giving cases of this

kind "precedence over all other cases," the Solicitor-General moves the court to advance these cases on the docket and set them down for hearing on such day as may be convenient to the court.

Notice of this motion has been served upon opposing counsel in all of the cases.

HENRY M. HOYT,
Solicitor-General.

FEBRUARY, 1909.

O

Office Supreme Court, U. S.
FILED.
OCT. 2 1909
JAMES H. McKENNEY,
Clerk.

No. 120.

In the Supreme Court of the United States.

OCTOBER TERM, 1909.

THE UNITED STATES, PLAINTIFF IN ERROR,

v.

THE UNION SUPPLY COMPANY, DEFENDANT IN ERROR.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

BRIEF FOR THE UNITED STATES.

In the Supreme Court of the United States.

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THE UNITED STATES, PLAINTIFF IN ERROR,
v.
THE UNION SUPPLY COMPANY, DEFENDANT IN ERROR.
No. 120.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

BRIEF FOR THE UNITED STATES.

STATEMENT.

Defendant in error, a corporation of New Jersey, was in business throughout the month of November, 1906, as a wholesale dealer in oleomargarine; and on April 23, 1907, the indictment whose sufficiency underlies the present case was found against defendant in error by the grand jury of the District Court for the District of New Jersey for a violation of section 6 of the act of Congress approved May 9, 1902 (32 Stat., 193, ch. 784), which reads as follows:

> That wholesale dealers in oleomargarine, process, renovated, or adulterated butter shall keep such books and render such returns in

> relation thereto as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may, by regulation, require; and such books shall be open at all times to the inspection of any internal-revenue officer or agent. And any person who willfully violates any of the provisions of this section shall for each such offense be fined not less than fifty dollars and not exceeding five hundred dollars, and imprisoned not less than thirty days nor more than six months.

The indictment avers that on December 1, 1906, the regulations made by the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, concerning the books to be kept and the returns to be made by wholesale dealers in oleomargarine included the following:

> Every wholesale dealer in oleomargarine is required to enter, on the day when received, in a book (Form 61) or on Form 217, properly bound, the number of packages and pounds of oleomargarine received, the number of packages and pounds of oleomargarine disposed of, and the name and place of business or residence of each person to whom sold or consigned.
>
> Wholesale dealers in oleomargarine will make monthly returns on Form 217 (with inside sheets when needed to complete the detailed statements), showing in detail the number of packages and number of pounds of oleomargarine received direct from manufacturers and other wholesale dealers, also the quantity disposed of, with the name and address of each

> person to whom sold or consigned. These returns will be rendered on the first day of the month succeeding that for which the return is made, or within ten days thereafter, in duplicate, to the collector, who will forward one copy to the Commissioner of Internal Revenue. [Rec. 1, 2];

that defendant in error "did on, to wit, the first day of December, one thousand nine hundred and six, make a certain return on Form 217, so required as aforesaid, showing thereby that it, the said The Union Supply Company, had then and there, and during the month of November, aforesaid, received a large quantity of oleomargarine, to wit, seven thousand six hundred and twenty-eight pounds thereof, which had been disposed of as follows, that is to say," to specified persons in specified amounts aggregating 7,628 pounds; that "said return was false and untrue in that it, the said The Union Supply Company, did not, by sale or otherwise, dispose of the said" previously specified amounts of the oleomargarine, or any part thereof, to the persons named in defendant in error's stated return of December 1, 1906, as its recipients (Rec., p. 2); and that on December 1, 1906, defendant in error "in manner and form aforesaid, did knowingly, willfully, and unlawfully fail to render such return in relation to its business of wholesale dealer in oleomargarine as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, did, by regulation, then and there require, contrary to the

form of the statute in such case made and provided, and against the peace and dignity of the United States" (Rec., p. 3).

Defendant in error moved to quash the indictment, and the District Court did quash it on the sole ground that the stated section 6 of the act of May 9, 1902, "is not applicable to a corporation" (Rec., 6, 7).

The case comes to this court on direct writ of error to the District Court under the provisions of the criminal appeals act of March 2, 1907 (34 Stat., 1246, ch. 2564), which allow such writ "from a decision or judgment quashing, setting aside, or sustaining a demurrer to, any indictment, or any count thereof, where such decision or judgment is based upon the invalidity, or construction of the statute upon which the indictment is founded."

The act of May 9, 1902, of which section 6 is above quoted, amends and is supplemental to the oleomargarine act of 1886 (24 Stat., 209, ch. 840), and the two statutes are undoubtedly *in pari materia*. Attention is called to this at the outset because reference will frequently be made to the act of 1886 in the argument.

ASSIGNMENT OF ERRORS.

The United States claims that there was error in the proceedings below in that—

1. The District Court for the District of New Jersey should not have quashed the indictment. (Rec., p. 8.)

2. Said District Court erred in holding that the sixth section of the act of Congress approved May 9, 1902, is not applicable to a corporation. (Rec., p. 9.)

3. Said District Court erred in holding that a corporation can not be convicted of or punished for a violation of said section 6 of the act of May 9, 1902. (Rec., p. 9.)

ARGUMENT.

These three propositions will be asserted by the Government:

First. As the sole ground of the District Court's decision was that section 6 of the act of May 9, 1902, is not applicable to a corporation, this court now has before it only the question whether that section does reach to corporations operating as wholesale dealers in oleomargarine.

Second. In a true view, section 6 of the act of May 9, 1902, embraces corporate wholesale dealers in oleomargarine; and a corporation may be fined thereunder.

Third. If this court may now enter upon the question whether the indictment states a case even though section 6 of the act of May 9, 1902, applies to a corporation, the indictment must be held good; because (I) it charges willful omission to report what the statute made it the duty of defendant in error to report; and (II) a willfully untrue report is a violation of said section, no less than a failure to report.

And, concerning these—

FIRST.

As the sole ground of the District Court's decision was that section 6 of the act of May 9, 1902, is not applicable to a corporation, this court has now before it only the question whether that section does in truth reach to corporations operating as wholesale dealers in oleomargarine.

In *United States* v. *Keitel* (211 U. S., 370) there were involved, beside the question of statutory construction which supported the Government's appeal, certain other questions which this court described as "various contentions relating merely to the construction of the indictment as a pleading, by which the United States contends that the court below was wrong, even if, for the sake of argument, it be assumed that its construction of the statutes was right, and by which the defendants in error contend that the order quashing the indictment was right, even if the court was wrong in its view of the law, because of defects in the indictment" (pp. 386, 387). After disposing of the question of statutory construction, this court further said:

> Finally, we come to the two contentions of the Government which we have hitherto temporarily put aside, and to the various contentions on the part of the defendants in error, insisting either that the court below misconstrued the indictment, or that there were such defects in the indictment that it was rightly quashed, irrespective of the construction of the statutes which led the court below to do so. But we do not think we have jurisdiction on

> this writ of error to consider these questions. The right of the United States to come directly to this court because of the construction of the statutes by the court below, as we have previously said in considering the question of jurisdiction, is solely derived from the act of 1907, the text of which is printed in the margin. That act, we think, plainly shows that in giving to the United States the right to invoke the authority of this court by direct writ of error in the cases for which it provides contemplates vesting this court with jurisdiction only to review the particular question decided by the court below for which the statute provides. In other words, that the purpose of the statute was to give the United States the right to seek a review of decisions of the lower court concerning the subjects embraced within the clauses of the statute, and not to open here the whole case (pp. 397, 398).

In the case now at bar the decision below was put exclusively upon the ground that section 6 of the act of May 9, 1902, does not apply to a corporation. All other questions involved in the case must therefore now be taken to have been decided by the lower court in favor of the United States; including any question whether the indictment really charges a failure of defendant in error to make return of its transactions. Not this court now, but the court of appeals after final judgment, should review the lower court's action in reference to all points but its decision that the statute on which the indictment is founded does not embrace a corporation.

If the District Court had held the contrary of its actual decision concerning the applicability of the statute to corporations and thereupon had overruled the motion to quash the indictment, defendant in error could not have appealed from that decision until after final judgment against it, and then its appeal would be to the Court of Appeals. The circumstance that the District Court actually held the statute inapplicable to a corporation, with the result that the Government could and did appeal to this court on that question, should not entitle defendant in error to a review by this court of other questions in the case—in advance, too, of final judgment—when upon an opposite decision of the question of statutory construction defendant in error could take no appeal until after final judgment against it, and its appeal then would not be to this court.

SECOND.

In a true view, section 6 of the act of May 9, 1902, does embrace corporate wholesale dealers in oleomargarine, and a corporation may be fined thereunder.

I.

The duty to make the returns provided for by section 6 of the act in question was undoubtedly imposed upon corporations as well as upon natural persons.

1. The historical development of said section 6 makes it obvious that the section refers to all wholesale dealers in oleomargarine, corporate as well as natural. The original oleomargarine act of August 2, 1886, contained no similar provision as to

books or returns by wholesale dealers. Section 5 of that act did require manufacturers of oleomargarine to "keep such books and render such returns of materials and products * * * as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may by regulation require;" and section 20 provided "that the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may make all needful regulations for the carrying into effect of this act." Acting under the language just quoted, the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, at once made regulations requiring wholesale dealers to keep books and make returns, those regulations being in substantially the form of the now existing regulations. This court held, however, as to an indictment found in May, 1888, that a wholesale dealer disobeying the regulations by not keeping books or making returns could not be punished criminally under section 18 of said act of August 2, 1886, because the statute itself did not require books or returns of wholesale dealers, and the authority given to the Treasury Department to make regulations for carrying the act into effect could not extend to the creation by the Secretary of the Treasury and the Commissioner of Internal Revenue of a new criminal offense. (*United States* v. *Eaton*, 144 U. S., 677.)

Pending the litigation just described, Congress enacted the act "to reduce the revenue and equalize

duties on imports, and for other purposes," approved October 1, 1890, and section 41 of that statute reads as follows:

> That wholesale dealers in oleomargarine shall keep such books and render such returns in relation thereto as the Commissioner of Internal Revenue, with the approval of the Secretary of the Treasury, may by regulation require, and such books shall be open at all times to the inspection of any internal-revenue officer or agent. (26 Stat., 567, 621.)

This section of the act of 1890 was undoubtedly occasioned by the litigation in the Eaton case; and it will be noticed that the act is identical with section 6 of the act of May 9, 1902, except that this last statute adds a clause for punishment of offenders against the section by a fine of not less than $50 and not more than $500, and imprisonment for not less than thirty days nor more than six months.

Doubt concerning the applicability of section 41 of the act of 1890 to corporate wholesale dealers is impossible. The occasion for adoption of that section was perfectly general, being the absence of any criminal sanction for enforcement of the regulations adopted by the Treasury Department, whether against natural persons or corporations. The language of section 41 of the act of 1890 is entirely general and embraces all "wholesale dealers in oleomargarine." And, finally, the provision for punishment of offending wholesale dealers by imprisonment as well as fine—which occasioned the difficulty

found by the District Court in the way of applying the section to corporations—is not present in section 41 of the act of 1890, but made its first appearance in the act of 1902.

Can it be supposed from the mere fact that the clause for punishment of offenders by fine and imprisonment was added in 1902, that Congress intended to make inapplicable to corporations the requirement of books and returns which unmistakably under the identical substantive language of section 41 of the act of 1890 extended to corporations as much as naturalpersons? Where and what is the reason for exemption of corporations in 1902 from the general duty of keeping books and making returns which previously rested upon both corporations and natural persons and which the act of 1902 certainly left operative as to natural persons?

2. The general purposes of the oleomargarine legislation make it clear that section 6 imposes a duty upon corporations.

This oleomargarine legislation has had two general objects: First to raise revenue, and second to prevent imposition upon purchasers through sale to them of oleomargarine and other imitation dairy products under a false name or guise. All the details of the legislation look to one or another of these purposes. By the test of either purpose it is inconceivable that Congress did not intend to legislate concerning the specified products when manufactured or dealt in by corporations. Nor does the language of the act lend

any countenance to such an idea. It deals throughout with the enumerated products themselves or with the business of manufacturing or dealing in those products. Nowhere does it purport to deal with less than the entire body of products, manufacturers, or dealers. If it did, it would be most unjust and oppressive, if not unconstitutional, as a tax measure; and as a protective measure it would be absurd. Protection of the public against imposition by natural persons manufacturing or dealing in oleomargarine or other imitation dairy products, without protection against like imposition by corporations, would be practically little better than no protection at all, and in legal theory would be worse. Indeed, it was largely to meet a situation of only partial protection of the public against frauds through sale of oleomargarine, imitation butter, etc., in a false character that the act of 1902 was passed, and that section 1 of that act subjected the imitation products (though sold and transported from one State into another) to the operation of like state laws at once upon their arrival at destination.

3. The language of section 6 is peculiarly unfortunate for the contention that any particular class of persons is free from the duty created by the section.

There is not even room here for the contention that the word "person" sometimes does not include a corporation. The section says that "wholesale dealers in oleomargarine" must keep books and make returns. It rests the obligation upon the nature of

the business conducted, not upon the personality of him who conducts it. It is "dealers" who must meet the obligation, and all dealers. Nor is section 6 peculiar in its application to corporations, or in the language designating the persons on whom it shall bear. Thus, section 1 makes "oleomargarine, butterine, imitation, process, renovated or adulterated butter," and other specified imitation dairy products subject to state laws upon their arrival elsewhere than in the State of their manufacture. Section 2 (amending former legislation) requires "wholesale dealers" and "retail dealers" in certain kinds of oleomargarine or butterine to pay taxes as stated. Section 3 provides for taxation of "oleomargarine"—the product itself. Section 4 imposes special taxes upon "manufacturers of process or renovated butter," upon "maufacturers of adulterated butter," upon "wholesale dealers in adulterated butter," and upon "retail dealers in adulterated butter." It also requires "every manufacturer of process or renovated butter or adulterated butter" to observe various regulations. It also prohibits "dealers in adulterated butter" from selling that article except in original stamped packages. It also requires "every manufacturer of adulterated butter" to place a label on each package, warning persons against use of the package again without previously destroying the stamp upon it. It also imposes a tax on "adulterated butter." Section 5 makes the meat-inspection law of 1890, as amended, applicable to

process or renovated butter and requires the Secretary of Agriculture to cause sanitary inspection to be made of "all factories and storehouses where process or renovated butter is manufactured, packed, or prepared for market." It also requires "all process or renovated butter and the packages containing the same to be marked with the words 'Renovated Butter' or 'Process Butter.'" Section 6, the last section, has already been quoted.

All these provisions reach corporations. Why is not a corporation a "wholesale dealer" within section 6 as well as within section 2? Why is not a corporation a "wholesale dealer" within section 6 as well as a "manufacturer" or a "retail dealer" within section 2 or section 4?

II.

Corporations being under the duty to keep books and make returns as wholesale dealers, they are subject to the criminal punishment which section 6 visits upon violators of that duty, so far as their nature makes possible. While they can not be imprisoned, they may be subjected to the statutory fine.

1. It is obvious that unless the duty prescribed by the statute can be enforced by punishing those who disregard that duty, the purpose of the statute in imposing the duty wil' be largely defeated. If the defendant in this case can not be punished for refusing or failing to keep the books or make the returns required of it, the frequent result will be that corporate dealers in oleomargarine or in process, renovated, or adulterated butter will not keep such books or make such returns; and without such books and returns

the administrative officers of the Government will be unable to exercise the supervision necessary for efficient enforcement of other parts of the law.

Further than that, if corporations are not punishable under section 6, neither can they be punished under section 4 of this act of 1902 or under section 6 of the oleomargarine act of August 2, 1886 (24 Stat., 209, ch. 340) for not packing their commodities or for not labeling or stamping their packages as required by those sections; because each of those sections punishes its violation by both fine and imprisonment. Likewise, corporations may violate with impunity sections 10, 13, 15, and 17 of the act of 1886; all of which sections punish their infraction by both fine and imprisonment.

The stated sections are the very vitals of this legislation; and if corporations are not amenable to punishment for their violation, then the entire legislation might better be swept from the statute books; for corporations may be expected, in case they are beyond the reach of the criminal provisions of the statute, not only to impose their imitation products as genuine, but also largely if not entirely to avoid the special taxes levied by the act, and thus to defraud both the purchasing public and the Government. The construction of the statute which would bring about such a result is out of question.

2. The penal clause of section 6 is directed against all "persons" who violate the section, whereas the duty created by the section is imposed upon all "wholesale dealers." But the punishment certainly

is intended to fall wherever the duty exists and is disregarded. There is no difficulty in including corporations within the designation "persons," even in a criminal act. Among many cases so holding are:

U. S. v. *Amedy* (11 Wheat., 392, 412).
I. Clark & M. Priv. Corp. (sec. 252).
State v. *Security Bank of Clark* (2 S. D., 538).
State v. *B. & O. R. R. Co.* (15 W. Va., 362).
U. S. v. *B. & O. R. R. Co.* (Fed. Cas., No. 14509).
U. S. v. *John Kelso Co.* (86 Fed., 304).

The case of *U. S.* v. *Amedy, supra*, was cited with approval in *Beaston* v. *Farmers' Bank* (12 Pet., 102, 135), and *Bank of Augusta* v. *Earle* (13 Pet., 519, 588).

Aside from judicial authority we have also the express declaration of section 1 of the United States Revised Statutes that "in determining the meaning of the Revised Statutes, or of any act or resolution of Congress passed subsequent to February 25, 1871, * * * the word 'person' may extend and be applied to partnerships and corporations * * * unless the context shows that such words were intended to be used in a more limited sense." In this case the context clearly requires that the word "person," as used in the statute, be given the widest inclusiveness; for, as has been shown, the duty to make the prescribed returns was plainly imposed on corporations, the exposure to punishment for breach of that duty should be coextensive with the reach of the duty, and the duty can not be enforced effect-

ively unless its violators may be subjected to punishment. The importance attached by Congress to the enforcement of the particular provision of section 6 is shown by the severity of the prescribed penalty.

3. The statute then is to be read as if it expressly stated (as some federal statutes do; see 34 Stat., ch. 2907, p. 1264, punishing bribery of meat inspectors) that "every person *or corporation*" violating its provisions should be fined and imprisoned. If the statute so read, no one would doubt that it could be enforced through the imposition of a fine only upon corporations. The requirement of imprisonment would be held inoperative in the case of a corporation, solely because of the impossibility of executing it, but, in all other respects, the statute could and would be given full effect.

The supposed case is clear, because the insertion of the word "corporation" would make plain the intent on the part of Congress to punish a corporation for violating the statute, and courts would give effect to that intent so far as possible. The unavoidable escape of a corporation from part of the punishment would not be a reason for relieving it from the fine. In section 6, as it stands, however, the congressional intent to subject corporations to the prescribed duty and also to punishment for disregard of that duty is no less clear than it would be if corporations were expressly named. Besides the entire generality of the language, the accomplishment of the fundamental purposes of the statute requires that the statute be

not restricted to natural persons; and, as will later be argued, even the constitutional validity of the statute requires the same result.

Courts have frequently held that an exception should be read into a statute where for one or another reason it is apparent that some particular matter, though within the statutory language, can not be within the legislative intent (Lewis' Sutherland on Construction of Statutes, 2d ed., sec. 372); but the exception should not be made wider than the reason which underlies it. An exception to the general rule of punishment by both fine and imprisonment for violation of section 6 must be recognized in the case of corporations, because imprisonment of a corporation is physically impossible; but the exception to the rule can not reach to the fine, because a corporation can be fined as well as a natural person.

4. Nor is the construction here urged at all novel. It was adopted by the Court of Appeals of Kentucky in *Commonwealth* v. *Pulaski County A. & M. Ass'n* (92 Ky., 197), and is approved in the recent and excellent work by Clark & Marshall on corporations, where it is said:

> If the penalty prescribed for an offense is both fine and imprisonment the statute can not be applied to corporation in so far as regards the imprisonment, but the inability to punish by imprisonment does not prevent an indictment against a corporation and its punishment by fine. (1 Clark & M. Priv. Corp., sec. 251, p. 657.)

In an extended search of the authorities no decision holding a contrary doctrine has been found; and it is submitted that both reason and authority require that the statute in question be construed as imposing a fine alone as the punishment for violation of its terms by a corporation.

5. While the court below delivered no opinion in this case it is safe to assume that its earlier decision in the case of *United States* v. *Braun & Fitts* (158 Fed., 456) expresses its views, for the question in each case was the same. From the Braun & Fitts case it would appear that the grounds of the decision in the case at bar were: First, that because of the impossibility of imprisoning a corporation the judgment of the court could not be made to conform to the statute, and that consequently the corporation was not amenable to prosecution; and, second, that "the fact that section 6 does not expressly include corporations amongst the parties who may be punished thereunder, while they are expressly included in the provisions of section 5, and the fact that the penal provisions of section 6 are applicable only to 'any person' who 'willfully' violates the provisions of that section, show that it was not the legislative intent by section 6 to regulate in anywise the business of any corporation" (p. 458), notwithstanding that "one may not easily discover a reason for including corporations in the provisions of section 5 and excluding them from the provisions of section 6" (p. 457).

The rule of law supposed to support the first ground of the decision was deduced by the court from the cases of *Ex parte Karstendick* (93 U. S., 396), *In re Mills* (135 U. S., 266); *United States* v. *Pridgeon* (153 U. S., 48), and several Circuit Court and Circuit Court of Appeals cases, all of which will be noticed.

In the Karstendick case the question before the court for decision was whether "where the punishment provided for by the statute is imprisonment alone, a sentence to confinement at a place where hard labor is imposed as a consequence of the imprisonment, is in excess of the power conferred" (p. 399). Immediately after this statement of the issue involved the court said:

> We have not been able to arrive at this conclusion. In cases where the statute makes hard labor a part of the punishment, it is imperative upon the court to include that in its sentence. But where the statute requires imprisonment alone, the several provisions which have just been referred to [i. e., authorizing sentences of imprisonment to be executed in state prisons and providing that federal convicts should be subjected to the same discipline and treatment as state convicts] place it within the power of the court, at its discretion, to order execution of its sentence at a place where labor is exacted as part of the discipline and treatment of the institution or not, as it pleases (p. 399).

In the case at bar, the court below relied upon the second sentence of the foregoing quotation as sus-

taining its views of the law. That sentence was pure *dictum*, however. The *decision* was that, because of the statutes authorizing the commitment of federal prisoners to state prisons where hard labor was part of the discipline, the court had discretion to sentence offenders either to imprisonment alone or to imprisonment at a place of confinement where hard labor would be a part of the discipline, although the statute creating the offense prescribed punishment by imprisonment only.

Further, the *dictum* itself is irrelevant to this case; because, first, the Chief Justice was speaking of imprisonment of a natural person whom it is just as possible to put at hard labor as to imprison him at all; and, second, imprisonment without labor is certainly a different and is probably a worse punishment than imprisonment at labor. The question in the case at bar is whether part of the statutory punishment may be imposed when, first, the rest of the punishment is impossible and, second, the partial punishment is obviously lighter than the whole.

In the Mills case the claim was that the District Court of the United States for the Western District of Arkansas was without jurisdiction to try the defendant because the offense was committed in the Indian Territory and was punishable by imprisonment only, whereas the jurisdiction of said District Court over criminal cases arising in the Indian Territory was limited to those in which the punishment was imprisonment at hard labor. The court, on

page 266, cited the Karstendick case to show that the offense in question *might* be punished with imprisonment at hard labor; and because of that fact held that it was within the District Court's jurisdiction, although the statute creating the offense prescribed only imprisonment as punishment.

In the Pridgeon case the only portion of the decision which the trial court in the case at bar could have had in mind was that part which involved the question whether the sentence was void, so as to entitle Pridgeon to release on *habeas corpus*, because it sentenced him to imprisonment *at hard labor* while the penalty prescribed was imprisonment only. The court held that since the penitentiary designated in the sentence was one where hard labor was part of the discipline and treatment it was "doubtful whether upon a writ of error the prisoner would have been entitled to a modification of his sentence by striking out the 'hard labor' portion thereof" (p. 61); but that, in any event, the sentence was not void, and the petitioner was therefore not entitled to release on *habeas corpus*.

Not one of these cases therefore supports the theory of the trial court that the defendant is not liable to prosecution under section 6 because the "judgment" in the case could not "conform strictly to the statute." The use of the word "judgment" was not happy in this connection because, no matter how absurd it might be to do so, the *judgment* itself might be in the very words of the statute. What the

court meant was that, since the *punishment* could not be made to conform with the statute to its full extent in the case of this defendant, it could not be prosecuted. The cited decisions of this court fail to uphold this conclusion of the trial court. In each of them, indeed, the punishment differed from that prescribed by the statute creating the offense (and in the Pridgeon case the judgment as well as the punishment so differed), and yet this court held that the statute creating the offence was to be construed in the light of other statutes relating to punishment of offenses, and that because the latter statutes authorized imprisonment at hard labor the former statute should be construed as giving the court *discretion* to impose a sentence involving hard labor or not, as it might think best, though in terms the statute limited the punishment to imprisonment alone.

The cited opinions of other Circuit Courts might seem, on first thought, to sustain the general rule that the judgment of the court must always conform strictly and completely to the statute. They held that where the prescribed punishment was imprisonment at hard labor (*In re Johnson*, 46 Fed., 477; *Harman* v. *United States*, 50 Fed., 921; *In re Christian*, 82 Fed., 199), or both fine and imprisonment (*Woodruff* v. *United States*, 58 Fed., 766), a sentence to imprisonment alone, without hard labor, in the one case, or to a fine alone without imprisonment in the other case, was erroneous. But in each of these

cases the exact punishment prescribed *could have been* imposed, and the question in each case was, therefore, whether the court had discretion to impose a different punishment from that provided in the statute and susceptible of full execution. Doubtless it is true that the legislature can grant or withhold such discretion at its pleasure. Here, however, the question is not whether *the court has discretion* to impose a punishment different from that prescribed, but *whether the punishment in fact prescribed by the statute in case of its violation by a corporation is fine alone.* If it is, then not only would the court not be exercising any discretion in imposing the fine, but *the judgment in such case would conform exactly to the statute.* In other words, the question in each of the Circuit Court cases was in relation to the right of the court to depart from the statutory punishment, while here the question is solely one of construction of the statute itself, for ascertaining what punishment it puts upon a corporation.

But one other case was cited by the court below, viz, *Whitworth* v. *United States* (114 Fed., 302), decided by a Circuit Court of Appeals. In that case the statute prescribed both fine and imprisonment as punishment for the offense charged. Upon conviction the defendant was sentenced to imprisonment and to pay a fine *together with the costs of suit.* On writ of error the Circuit Court of Appeals first held that so much of the sentence as required the payment of costs was in excess of the punishment prescribed by law and erroneous; and the judgment was re-

versed and remanded with directions to impose a new sentence omitting costs. Later, however, the court's attention was called to another statute authorizing payment of costs to be imposed as a part of the sentence, and it thereupon, by an addition to its opinion, confessed that it had fallen into error, though as its mandate had already been executed nothing could be done. The opinion therefore is not entitled to great weight; but, if sound, it has no pertinence here. The difference is obvious between such decision, that a *greater* punishment than was allowed by law could not be imposed, and the question of construction involved here.

Such are all of the authorities relied on by the lower court to support its first ground of decision. Their inapplicability could not be more apparent.

The second ground of the decision below was that, because section 5 imposes a penalty upon "any person, firm, or corporation" violating the section, it must be *presumed* that section 6, which provides only that "any person" violating the statute shall be punished, was not intended "to regulate in any wise the business of any corporation." That such a view is contrary to the very purpose of the act, and would destroy its effectiveness, has already been sufficiently argued. The whole act, however, cries out against such a construction; for, if that one mention of "corporations" in section 5 shows a legislative intent to confine the operation of the act to natural persons, except when corporations are expressly

mentioned, then *no provisions of the statute (except those of section 5) can be applied to corporations. And this will be true also of the Oleomargarine Act of 1886, to which the act of 1902 is a supplement. Nowhere, save in section 5 of the later act, are corporations expressly referred to.* In every definition of a dealer or manufacturer and in every other penal clause except that in said section 5, only *persons* are named. Thus, in the act of 1902, section 4 defines a manufacturer of process or renovated butter as "every *person* who engages," etc., and a dealer in like butter as "every person who sells," etc. *These definitions are for purposes of determining the liability to taxation.* The same section provides that "every *person* who carries on the business" of a manufacturer of process or renovated or adulterated butter, and "every person who carries on the business of a dealer" in like butter, without first paying the prescribed taxes, shall be fined, and, after requiring such process, renovated or adulterated butter to be packed in new packages marked and branded as stated and stamped so as to show payment of the manufacturer's taxes, provides that "every *person* who knowingly sells or offers for sale, or delivers or offers to deliver, any adulterated butter in any other form than in new wooden or paper packages, as above described, or who packs in any package any adulterated butter in any manner contrary to law, or who falsely brands any package or affixes a stamp on any package denoting a less amount of tax than that re-

quired by law, *shall be fined for each offense not more than one thousand dollars and be imprisoned not more than two years.*" If, because corporations are mentioned in section 5 but not in these definitions and penal clauses, particularly the one last quoted, corporations are not within the purview of such clauses, then corporations are not within the horizon of the act at all, but are subject only to the meat-inspection act referred to in section 5; and the result is that these products, if manufactured or dealt in by natural persons, must be packed, branded, labeled and stamped, and are subject to state laws and to taxation; but, if manufactured or dealt in by corporations, are free from all regulation and taxation.

Indeed, like reasoning would lead to the conclusion that partnerships are unregulated, except under section 5, for that section alone expressly mentions them. Further, since this act of 1902 and the oleomargarine act of 1886 are to be construed as *in pari materia*, the taxes and obligations imposed by the latter act (if the trial court's reasoning be correct) do not apply to corporations; for here again only persons are named in the definitions and penal clauses. By section 3 "every *person*" who deals in original packages of oleomargarine is to be deemed a wholesaler, and "every *person*" who sells less than 10 pounds at one time shall be deemed a retailer. Section 4 imposes a penalty on "every *person* who carries on the business of a manufacturer of oleomargarine without having paid the special tax therefor," and also upon "every *person*" who carries on

the business of a wholesaler and "every *person*" who carries on the business of a retailer, without first paying the special tax. Sections 6 and 10 impose a penalty of *both* fine and imprisonment on "every *person*" who violates the provisions of the act concerning packing and stamping. Section 11 imposes a fine upon "every *person* who knowingly purchases or receives for sale any oleomargarine which has not been branded or stamped according to law." Section 12 imposes a fine on "every *person* who knowingly purchases or receives for sale any oleomargarine from any manufacturer who has not paid the special tax." Section 13 imposes a fine on "any *person*" who refuses or neglects to cancel the stamps on used packages or sells or gives away a stamped package after the same has been emptied. Section 15 imposes a penalty upon "any *person*" who willfully defaces the stamps on any unopened package. Section 16 requires "every *person* who shall export oleomargarine" to brand every tub or other receptacle containing it. Section 17 provides—

> That whenever any *person* engaged in carrying on the business of manufacturing oleomargarine defrauds, or attempts to defraud, the United States of the tax on the oleomargarine produced by him, or any part thereof, he shall forfeit the factory and manufacturing apparatus used by him, and all oleomargarine and all raw material for the production of oleomargarine found in the factory and on the factory premises, and shall be fined not

> less than five hundred dollars nor more than five thousand dollars, and be imprisoned not less than six months nor more than three years.

Section 18 is as follows:

> That if any manufacturer of oleomargarine, any dealer therein or any importer or exporter thereof shall knowingly or willfully omit, neglect, or refuse to do, or cause to be done, any of the things required by law in the carrying on or conducting of his business, or shall do anything by this act prohibited, if there be no specific penalty or punishment imposed by any other section of this act for the neglecting, omitting, or refusing to do, or for the doing or causing to be done, the thing required or prohibited, he shall pay a penalty of one thousand dollars; and if the person so offending be the manufacturer of or a wholesale dealer in oleomargarine, all the oleomargarine owned by him, or in which he has any interest as owner, shall be forfeited to the United States.

Because it shows how completely the acts of 1886 and 1902 are correlated, attention is called to the fact that by section 4 of the latter act sections 9 to 21, inclusive, of the earlier act are made applicable to dealings in process, renovated, and adulterated butter, concerning which the later act in part legislates.

The presumption indulged by the trial court with regard to the legislative intent concerning corporations is altogether too violent to be sustained, at

least in the light of the many provisions of the statute above adverted to, which specifically name only persons but must have been intended to apply equally to corporations, if the declared purpose of the legislation was the real one.

The final idea of the court below that a corporation can not be guilty of "willfulness" in omitting to keep books or make returns needs no more attention than a reference to *New York Central, &c., R. R. Co.* v. *United States.* (212 U. S., 481, 492–496.)

6. The difficulties which the courts would encounter, if the rule that courts have no *discretion* to impose a different punishment from that prescribed by the statute is adopted as a rule of *construction*, so as to preclude the court from holding that a part of a statute is inoperative in some given case, may be illustrated in several ways. Suppose, for example, a man physically incapable of "hard labor" commits an offense punishable by imprisonment at hard labor—for example, perjury (sec. 5392, R. S.)—is he to be relieved of punishment altogether because he can not be put at hard labor? Or, to take a case from the statute now before the court, suppose a natural person engaged in carrying on the business of a dealer in oleomargarine or adulterated butter defrauds the United States of the taxes on his product and then flees the jurisdiction, can not his manufacturing apparatus and raw material be forfeited, as provided in section 17 of the act of 1886 (which is made a part of the act of 1902 in section 4), though

he can not himself be imprisoned? Or, to take a case still nearer to hand, suppose a natural person violates the very section now under consideration, but is insolvent at the time, so that a fine, if imposed, can not be collected, is he not amenable to prosecution? It is true that a fine could be *imposed;* but, even so, only one kind of punishment, *imprisonment*, could actually be inflicted, while two entirely separate and distinct kinds of punishment—a *money penalty* and imprisonment—are prescribed by the statute. In such a case the two kinds of punishment would no more be imposed than upon the corporation in the present case. These analogies are sufficient to show that so long as the punishment inflicted is of one or the other kind mentioned in the statute and the failure to inflict the other sort of punishment is not the result of an exercise of mere discretion by the court, but results instead from circumstances beyond the court's control, there is no failure of conformity between the statute and the sentence, because in such a case the statute is to be construed as requiring only the imposition of that punishment which is possible.

III.

If the construction placed upon section 6 by the trial court be correct, then corporations may violate many other important Federal statutes without incurring punishment.

The following offenses against the United States are punishable by both fine and imprisonment:

Carrying on business of rectifier or liquor dealer without payment of special tax. (Sec. 3242, R. S.)

Adding substances to spirits to create fictitious proof. (Sec. 3252, Id.)

Defrauding the United States of tax on spirits. (Sec. 3257, Id.)

Failing to register still. (Sec. 3258, Id.)

Failing to give notice of intention to conduct business of rectifier or distiller. (Sec. 3259, Id.)

Failing to give distiller's bond or giving fraudulent or forged bond. (Sec. 3260, Id.)

Using still, etc., where other business is carried on. (Sec. 3266, Id.)

Failing to put up distiller's or rectifier's sign. (Sec. 3279, Id.)

Carrying on distillery without giving bond. (Sec. 3281, Id.)

Making mash, wort, etc., elsewhere than at a distillery. (Sec. 3282, Id.)

Removing or concealing spirits. (Sec. 3296, Id.)

Making false entries or failing to keep books, by distiller. (Sec. 3305, Id.)

Using false weights or measures, by distillers. (Sec. 3306, Id.)

Commencing work of distilling without notice. (Sec. 3310, Id.)

Failing to keep prescribed books, by rectifiers and wholesalers. (Sec. 3318, Id.)

Changing stamps on and shifting spirits, etc. (Sec. 3326, Id.)

Evading tax, making false entries, etc., by brewers. (Sec. 3340, Id.)

Failing to comply with stamp law by brewers. (Sec. 3342, Id.)

Failing to comply with conditions of entering business of manufacturing snuff and tobacco. (Sec. 3355, Id.)

Failing to make annual inventory of same. (Sec. 3358, Id.)

Selling tobacco and snuff in other than prescribed packages. (Sec. 3363, Id.)

Removing snuff and tobacco except in proper packages or without stamp. (Sec. 3374, Id.)

Affixing false stamps to tobacco or snuff. (Sec. 3375 Id.)

Failing to destroy, or using again, stamped snuff or tobacco packages. (Sec. 3376, Id.)

Selling tobacco as made before certain date. (Sec. 3380, Id.)

Failing to comply with conditions before manufacturing cigars. (Sec. 3387, Id.)

Failing to make annual inventories, etc., by cigar manufacturers. (Sec. 3390, Id.)

Packing cigars contrary to law. (Sec. 3392, Id.)

Removing cigars from factory without properly packing, etc. (Sec. 3397, Id.)

Failing to properly stamp cigars manufactured on commission. (Sec. 3399, Id.)

Falsely representing cigars to have been made before certain date. (Sec. 3401, Id.)

Selling imported cigars not packed as required by law. (Sec. 3403, Id.)

Failing to destroy stamps on emptied cigar boxes. (Sec. 3406, Id.)

Contracting to supply cooley labor in violation of immigration law, section 4, act of March 3, 1875. (18 Stat., 477, c. 141).

Importation of women for prostitution. (Sec. 3, Id.)

Bringing Chinese laborers, not entitled to enter, into United States, act of May 6, 1882 (22 Stat., 61), section 11 as amended by act of July 5, 1884 (23 Stat., 117).

Counterfeiting or procuring counterfeiting of bank notes. (Sec. 5415, Id.)

Counterfeiting or procuring counterfeiting of foreign government securities. (Act of May 16, 1884 (23 Stat., 22).)

Uttering forged or counterfeited foreign government securities. (Sec. 2, Id.)

Counterfeiting or procuring counterfeiting of foreign bank notes. (Sec. 3, Id.)

Having in possession forged or counterfeited foreign government securities or bank notes. (Sec. 5, Id.)

Forgery of letters patent or utterance of forged letters patent. (Sec. 5416, R. S.)

Forging or using forged certificate of entry. (Sec. 5417, Id.)

Forging signature of court officer or using forged authentication of court record. (Sec. 5419, Id.)

Having forged papers in possession with intent to defraud United States. (Sec. 5422, Id.)

Forging or uttering forged ship's papers or customs-house documents. (Sec. 5423, Id.)

Passing, selling, concealing, etc., forged obligations of United States. (Sec. 5431, Id.)

Making false demand for annuity, dividend, pension, etc., on fraudulent power of attorney. (Sec. 5436, Id.)

Bribing federal judges. (Sec. 5449, Id.)

Bribing Members of Congress. (Sec. 5450, Id.)

Bribing any United States officer. (Sec. 5451, Id.)

Counterfeiting or uttering counterfeited gold or silver coin. (Sec. 5457, 5458, 5462, Id.)

Receiving articles stolen from the mail. (Sec. 5470, Id.)

Bribing meat inspectors. (Act of March 4, 1907; 34 Stat., 1264.)

If section 6 of the act of 1902 is to be construed as not applying to corporations, then none of the other provisions just enumerated applies to corporations. A construction which imputes to Congress an intention to legislate only concerning natural persons in these numerous and important respects, or which, if that intention is not to be imputed to Congress, would make ineffectual so many vital provisions, is not entitled to consideration.

IV.

A construction of section 6 which would limit its application to natural persons would render it unconstitutional or would at least make its constitutionality seriously questionable; and therefore such a construction is to be avoided.

1. If section 6 should be construed arbitrarily to impose upon natural persons alone the duty which it describes, or capriciously to impose only upon natural persons a punishment for breach of that duty, it would be repugnant to the due process clause of the fifth amendment to the Constitution. Of the scope of that clause this court has said:

> But it is not to be supposed * * * that the amendment prescribing due process of law is too vague and indefinite to operate as a practical restraint. It is not every act, legislative in form, that is law. Law is something more than mere will exerted as an act of power. It must be not a *special rule for a particular person or a particular case*, but, in the language of Mr. Webster, in his familiar definition, "the *general* law, a law which hears before it condemns, which proceeds upon inquiry, and renders judgment only after trial," so "that every citizen shall hold his life, liberty, property, and immunities under the protection of the *general rules* which govern society," and thus excluding, as not due process of law, acts of attainder, bills of pains and penalties, acts of confiscation, acts reversing judgments, and acts directly transferring one man's estate to another, legislative

> judgments and decrees, and other similar *special, partial, and arbitrary exertions of power under the forms of legislation. Arbitrary power, enforcing its edicts to the injury of the persons and property of its subjects, is not law*, whether manifested as the decree of a personal monarch or of an impersonal multitude." (*Hurtado* v. *California*, 110 U. S., 516, 535–536)
>
> Due process is so secured by laws operating on all alike, and not subjecting the individual to the arbitrary exercise of the powers of government unrestrained by the established principles of private right and distributive justice. (*Caldwell* v. *Texas*, 137 U. S., 692, 697.)
>
> Due process of law, within the meaning of the amendment, is secured *if the laws operate on all alike*, and do not subject the individual to an arbitrary exercise of the powers of government. (*Giozza* v. *Tiernan*, 148 U. S., 657, 662.)

Can it be any more due process to subject only an arbitrary part of those who are in all respects similarly situated to a duty or to criminal liability for its breach than it would be to single out one of them and legislate concerning him alone?

While classificatory legislation is proper, the classification must rest upon some just or reasonable basis. None such could be found for leaving corporations free from the duty or from the criminal sanction for the duty put upon natural persons by section 6.

2. Without depending on the specific clause concerning due process, it is probable that the fundamental principles of constitutional government prohibit such class legislation as this would be, if construed to relate to natural persons only. This court has intimated that even where no direct rule of the Constitution applies "there may nevertheless be restrictions [upon the power of Congress] of so fundamental a nature that they can not be transgressed, although not expressed in so many words in the Constitution." (Opinion of Mr. Justice White in *Downes* v. *Bidwell*, 183 U. S., 244; 291, quoted with approval in *Dorr* v. *United States*, 195 U. S., 138, 147.) And the question was raised, but not decided, in *District of Columbia* v. *Brooke* (214 U. S., 138, 149), whether it is not to be inferred from our form of government that Congress must not deny the equal protection of the laws.

3. If either of the foregoing propositions is sound, the construction placed upon section 6 by the trial court would render it unconstitutional. That construction is therefore to be avoided. But it is not necessary to go so far as to determine whether or not the stated propositions are sound. They certainly raise grave questions as to the validity of section 6 if construed to impose a duty or punishment upon natural persons only. In such a case all doubts should be resolved in favor of that construction which will preclude question as to the validity of the act.

It is elementary when the constitutionality of a statute is assailed, if the statute be

reasonably susceptible of two interpretations, by one of which it would be unconstitutional and by the other valid, it is our plain duty to adopt that construction which will save the statute from constitutional infirmity. *Knights Templars Indemnity Co.* v. *Jarman*, 187 U. S., 197, 205. And unless this rule be considered as meaning that our duty is to first decide that a statute is unconstitutional and then proceed to hold that such ruling was unnecessary because the statute is susceptible of a meaning, which causes it not to be repugnant to the Constitution, the rule plainly must mean that where a statute is susceptible of two constructions, by one of which grave and doubtful constitutional questions arise, and by the other of which such questions are avoided, our duty is to adopt the latter. *Harriman* v. *Interstate Com. Comm.*, 211 U.S., 407.

United States v. *Delaware & Hudson Co.*, 213 U. S., 366, 407–408.

THIRD.

If this court may now enter upon the question whether the indictment states a case, even though section 6 of the act of May 9, 1902, applies to a corporation, the indictment must be held good, because (I) it charges a willful omission to report what the statute made it the duty of defendant in error to report; and (II) a willfully untrue report is a violation of said section, no less than a failure to report.

The indictment, it will be remembered, charges as defendant in error's offense that it "did knowingly, willfully, and unlawfully fail to render such return in relation to its business of wholesale dealer in oleomargarine as the Commissioner of Internal Revenue,

with the approval of the Secretary of the Treasury, did by regulation then and there require" (Rec., p. 3). It is true that the indictment also states that defendant in error, instead of making no return whatever, made a false return; but that averment is not inconsistent with the fundamental charge that defendant in error knowingly and willfully failed to make such return as was required of it by the Treasury regulations and the statute enforcing them. On the contrary, the false return, *beside being consistent with the charge*, gives it *double* substantiation; for (I) a willfully false return is necessarily a willful withholding of what the statute (underlying the Treasury regulations) requires to be stated, and such return also (II) violates the statute through being false, since the statute of course requires the return to be true. For both reasons the false return was not such as defendant in error was bound to give.

I. The statute demands, concerning such matters as the Treasury regulations require to be reported, that the actual facts be stated. The object of the return is to put the Treasury in possession of true information. When a false return is made, the Treasury is not given the information which the statute makes it the obligation of wholesale dealers in oleomargarine to furnish to the Government; and the failure to meet the obligation of disclosure is in itself a violation of the statute. The case is entirely different from that of a false statement made by a party who is not bound to make any statement. In the latter case silence is no offense. The truth may

be withheld or suppressed without wrong. But when, as here, obligation of disclosure of the truth exists, a willful failure to make the disclosure is an offense, whether that failure results from silence or from false statement.

It might as well be said that a debtor who is under obligation to make payment discharges that obligation by the delivery of counterfeit money or of a fictitious check as claim that a dealer in oleomargarine, who is under positive obligation to report his actual transactions, meets that obligation by falsely stating other than the real transactions. In either case there is a mere pretense of performance on the part of the person charged with the duty; and in neither case does the person for whose benefit the duty is created receive what is due him.

A willfully false return, too, involves an actual intention not to give the Government the information to which the statute entitles it. Not only is the duty of disclosure neglected, but it is designedly avoided.

Could anyone doubt the right of the Government to compel by mandamus the statutory duty of disclosure of the oleomargarine dealer's real transactions, notwithstanding the presentation to the Government of a willfully false report? The reason why mandamus for a true report would lie in such case is, not that a false report was made, but that in reality no report had been made of the facts which the oleomargarine dealer is under a positive duty to report.

II. In requiring the real facts, the statute, of course, forbids false statements leading away from those facts, whose purpose must be to delude the Government into a false belief that it has obtained the real facts, or to hamper the Government in the process of their ascertainment. Section 6 of the act of 1902 does not punish merely an omission to make a return, but says that "any person who willfully violates any of the provisions" of the section shall be punished; and the substantive provision of the section is that the wholesale dealer shall make "such returns" as the Treasury Department may by regulation require. The law forbids a false return as much as it commands a true return; and falsity of return is a violation of the section quite as much as omission to return.

Important considerations, not yet mentioned, support the correctness of *both* these propositions, I and II.

1. If a willfully false return is not a violation of section 6, either because it designedly withholds the truth or because it intentionally states an untruth, then the statute left wholly to the discretion of the Treasury officials whether or not by requiring an oath to the return they would make a false return an offense of any kind. Clearly, if the regulations of the Treasury Department should not require an oath, then a willfully false return would be no offense unless one or other of the positions above taken as to the construction and scope of section 6 is correct. It can not be that Congress intended to leave the efficacy of the statute completely dependent upon

the action of the Commissioner of Internal Revenue in requiring an oath. The scope of the return was left to regulation by the Treasury Department in order that it might from time to time determine, in the light of experience, the nature and number of the topics about which the Government ought to have information for its efficient administration of the law. With those topics determined and announced, however, the statute itself requires disclosure and itself forbids false statement.

2. If a willfully false return is not a violation of section 6, either as an omission to report the truth or as a misleading false statement, it is doubtful whether such return is an offense of any kind, even when the Treasury Department requires an oath; for it is uncertain whether the requirement of an oath by executive regulation will support a charge of perjury in the oath, when the statute does not itself require or expressly authorize the Treasury officials to require that the return be verified.

Williamson v. *United States* (207 U. S., 425).
United States v. *Eaton* (144 U. S., 677).
Caha v. *United States* (152 U. S., 211).

3. If the statute itself required an oath, argument might be made that Congress thereby manifested a purpose to have a false return punished as perjury; but as the statute does not require an oath the intention of Congress must have been to have a willfully false statement punished under section 6 itself, whether or not the Treasury officials should require an

oath. And that intention on the part of Congress makes a false return a violation of section 6, even if falsity of the oath made under the requirement of the Treasury officials will uphold a charge of perjury. Nor is this result strange when it is remembered that a willfully false return involves an intentional failure to report what the statute makes it the dealer's duty to report.

4. The practical importance of reports, and true reports, in obedience to the statute is manifest, both from the course of executive action and legislative repetition of the enactment for reports and from the practical bearing of the information to be obtained by the Government through the reports upon the law's administration.

As shown in the case of *United States* v. *Eaton* (144 U. S., 677), the Treasury officials adopted just such regulations as the present in August, 1886, immediately after the passage of the original oleomargarine act of 1886. Pending the Eaton litigation, Congress forestalled the point there involved by passing the act of 1890, which imposed the same obligation of returns by wholesale dealers as is found repeated in the act of 1902. The executive and the legislature have shown the importance which they attach to the requirement.

The bearing of the reports upon the government's efficiency in executing the law will readily appear. Their practical value lies in furnishing to the Government constant checks upon the operations of all classes of oleomargarine makers and dealers. For

example, a manufacturer is required to pay a tax of $600, a wholesale dealer in colored oleomargarine $480, a wholesale dealer in uncolored oleomargarine $200, a retail dealer in colored oleomargarine $48, and a retail dealer in uncolored oleomargarine $6. Beside this, manufacturers must pay a tax of 10 cents per pound upon colored oleomargarine and of one-fourth of a cent per pound upon uncolored oleomargarine; and any person who colors oleomargarine, in imitation of butter, is declared to be a manufacturer. The returns of wholesale dealers may often disclose the existence of manufacturers or other wholesale dealers from whom the reporting wholesale dealer has procured his stock and from whom the license tax or the tax per pound has not been collected. Such returns also afford a check upon the kinds and amounts of oleomargarine made by different manufacturers. If the returns show colored oleomargarine procured by the reporting wholesale dealer from another wholesale dealer, the result may be to show the latter to be a manufacturer and so subject to the manufacturer's license tax and tax per pound. The returns also furnish a check upon the operations of the very wholesaler who is reporting; because, if he sells more oleomargarine than he shows to have been received from manufacturers or other wholesalers, he must have been making oleomargarine himself and so subject to tax as a manufacturer; or if he shows sales of colored oleomargarine when he has bought none or has bought less than he

disposes of, he must have been coloring oleomargarine and has so made himself liable to tax as a manufacturer. Finally, the statement of the persons to whom the reporting wholesaler has sold oleomargarine will often disclose other wholesalers or retailers who are liable to the tax but otherwise might escape; and will afford a check upon the returns of such other wholesalers or retailers; and at times may well help to show that the latter are themselves coloring oleomargarine and so making themselves subject to tax as manufacturers. These reports, both from manufacturers and wholesalers, are indispensable aids to the administration of the law.

CONCLUSION.

The judgment below should be reversed.

LLOYD W. BOWERS,
Solicitor-General.

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No. 120

In the Supreme Court of the United States

OCTOBER TERM, 1909

THE UNITED STATES
Plaintiff in Error

vs.

THE UNION SUPPLY COMPANY
Defendant in Error

In Error to the District Court of the United States for the District of New Jersey

Brief and Argument for Defendant in Error

ISAAC R. HITT, Jr.
Attorney for Defendant in Error

PRESS OF W. A. ROBERTS CO.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1909.

THE UNITED STATES,
PLAINTIFF IN ERROR,
vs.
THE UNION SUPPLY COMPANY,
DEFENDANT IN ERROR.

No. 120.

IN ERROR TO THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF NEW JERSEY.

BRIEF AND ARGUMENT FOR DEFENDANT IN ERROR.

The Act of May 9, 1902 (32 Stat. L, p. 193, Ch. 784), is an original act which also amends the Act of August 2, 1886, and is not to be construed as a supplemental act, as the plaintiff in error endeavors to show. The act speaks on this subject, for itself.

Regulations No. 9, Revised, December 1904, concerning oleomargarine, referred to on page 1 of record, of which it appears profert was made, and the same not appearing among the papers, a printed copy, obtained from the office of the Commissioner of Internal Revenue is submitted herewith.

Answering contention "first," in plaintiff in error's brief, p. 5, I quote from United States vs. Braun & Fitts, 158 Fed. Rep., p. 456, as follows: "Section 5 (of above mentioned Act of May 9, 1902) applies, in express terms, to corporations, and gives the court discretionary power to punish either by fine or imprisonment or both. Since a corporation cannot be imprisoned, may the Court, under Sec. 6 (the section in question) disregard so much of that section as prescribes punishment by imprisonment and punish only by fine? One may not easily discover a reason for including corporations in the provisions of Section 5 and excluding them from Section 6."

Answering contention "second" of plaintiff in error. Attention is called to the decision of Judge Caldwell holding "in a case in which the statute prescribed a penalty of fine and imprisonment, that a sentence of imprisonment only was erroneous." (Woodruff vs. United States (C. C.) 58, Fed. Rep. 766.)

In Commonwealth vs. Association 92 Ky. 197, 17 S. W., 442, it was held "If the penalty prescribed for the act be both fine and imprisonment, then, so far as the punishment cannot, from the nature of the offender, be carried out, the statute is, of course, inoperative." (See also Clark's Criminal Law, 2d Ed. page 79). In the afore quoted case of United States vs. Braun & Fitts, it is also stated by the learned Judge, "It may be that such a construction discloses a serious defect in the law; but if so, that defect must be cured by congressional and not judicial legislation."

Contention "third" of plaintiff in error is not pertinent.

in that it assumes the guilt of the defendant in error, without and before a trial, when the question before the Court is: Does the law so stand as to allow a corporation to commit a crime and suffer punishment therefor by fine and imprisonment, under Sec. 6 of the Act of May 9, 1909? (See decisions previously quoted.) Also see

In Cumberland, etc., Canal Corp. vs. Portland, 56 Me., 77, and
Androscoggin Water Power Co. vs. Bethel Steam Mill Co., 64 Me., 441.

Further answering, the defendant in error calls attention to the fact that the plaintiff in error in its "motion to advance," stated to this Honorable Court that "The question involved is, whether Section 6 of the Act of May 9, 1902, applies to a corporation. A motion to quash the indictment on the ground that it did not so apply was sustained." (See Motion to Advance, No. 338 (Now No. 120), in the Supreme Court of the United States, October Term, 1908.)

It has been held, in substance, that Oleomargarine Acts are complete in themselves and contain provisions for all the punishment that Congress intended for violations of that act.

U. S. vs. Lamson, 165 Fed. Rep., 80.
Grier vs. Tucker, (C. C.), 150, Fed. Rep., 658.
Schafer vs. Craft, (D. C.), 144, Fed. Rep., 907.
Craft vs. Shafer, 153 Fed. Rep. 175; 82 C. C. A., 349.
Id., 154 Fed. Rep., 1002; 83 C. C. A., 677.

The contention of the plaintiff in error that a decision adverse to the Government will affect many other now existing laws seems unworthy of the high ideal which this Court

has ever endeavored to fill. The decisions of this Court are always far-reaching and the enactments of Congress are not necessarily settled law until passed upon by this tribunal.

Should it appear to this Honorable Court that there is much in the brief of the plaintiff in error that has been unanswered, I desire to state that those matters that are apparently unanswered are intentionally omitted because it seems to the defendant in error that they contain only matters foreign to the issue in this case. (See plaintiff's in error motion to advance previously cited.)

The Government's brief is so prolix, so apparently, at least, based on the fact that the defendant in error is guilty of the crime charged, forgetting that the criminal law of the land presumes innocence until after trial and conviction is had, so much space is taken up with sentiment and the bad results to follow an adverse decision, that we prefer to call the attention of this Honorable Court to the fact that the real issue in this case is simply, "Can a corporation, assuming it to have done that which, in an individual would have been punishable by fine and imprisonment, be punished by fine and imprisonment for a crime under the Sec. 6, in question?" and on that question we submit decisions previously quoted, and ask that the decision of the lower Court be affirmed.

Respectfully submitted,

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